Supreme Court of the United States

October Term, 1944.

No. 438

HOUBIGANT INC., CHERAMY INC., and HOUBIGANT SALES CORPORATION,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, AND SUPPORTING BRIEF.

ASHER BLUM,
Counsel for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Houbigant Inc., Cheramy Inc. and Houbigant Sales Corporation respectfully shows:

Your petitioners seek review of a judgment of the United States Circuit Court of Appeals entered June 9, 1944 (R. pp. 144 and 145). The opinion of the Circuit Court of Appeals (R. p. 132) is not officially reported.

Statement of Matter Involved.

The complaint of the Commission was filed on March 2, 1938 (R. p. 7).

The complaint (R. pp. 1-7), charged in Pars. 4-5, that petitioners had unlawfully labeled their perfumes, colognes, and toilet waters, in order falsely to ascribe French origin to domestic products.

The complaint is limited to the use of the accused designations on labels, tags, and bottles and invoices (Par. 5, p. 3). False advertising was not pleaded. The charge of unfair invoices was dropped. The Findings (R. p. 112, Par. 5) refer only to labels, markers, and containers.

As to Houbigant Inc., and Houbigant Sales Corporation, the Commission complained only of the use of

"Houbigant"

and of the combination

"Houbigant—Paris—New York" (R. p. 3, Par 5).

As to Cheramy Inc., the Commission complained only of the combination

"Cheramy—Paris—New York—France" (R. p. 3, Par. 5).

The Findings (R. p. 112, Par. 5), and the Commission's Order (R. p. 116, fols. 347 and 348) refer to certain additional marks, which were not pleaded in the complaint.

The Commission's complaint was filed on March 2, 1938, under the Federal Trade Commission Act, 15 U. S. C. A. 41-51. This was prior to the enactment of the Wheeler-Lea Act on March 21, 1938 (15 U. S. C. A. 52-58), and prior to the enactment of the Federal Food, Drug & Cosmetic Act on June 25, 1938 (21 U. S. C. A. 301-392; 52 Stat. 1040).

The Findings and Order of the Commission (R. pp. 109-116) were made and entered on April 16, 1942, which was long after the Federal Food, Drug & Cosmetic Act had gone into effect.

Houbigant Inc. is the American successor to a French perfume house, namely, "Parfumerie Houbigant" (R. pp. 25 and 26, fols. 75 and 76; p. 42, fol. 126; p. 43, fol. 127).

A perfume is a solution of a perfume concentrate in alcohol. Houbigant Inc. imported the concentrates from Parfumerie Houbigant, and it dissolved the imported concentrates in domestic alcohol (R. p. 29, fols. 85-88). It was stipulated (R. p. 104, fols. 311-312) that the value of the domestic alcohol was 10% of the value of the finished perfume.

Houbigant Sales Corporation is a selling agent of Houbigant Inc.

"Houbigant" is a French surname.

The Commission took no testimony about the effect of the "Cheramy" labeling.

Jurisdiction.

This is based on 28 U. S. C. A. 347 and 15 U. S. C. A. 45 (g) (h) (j).

Questions Presented For Review.

A. Whether the Commission, subsequent to the enactment of the Federal Food, Drug & Cosmetic Act, had jurisdiction to regulate markings on labels and containers of perfumes or other cosmetics.

B. Whether the Commission, upon the evidence, should have enjoined petitioners (R. p. 116, fol. 348) from using their corporate names or trademarks, unless they stated that their products were made in the United States.

C. Whether the Commission had the power, irrespective of the evidence, to grant an order of the scope herein.

Reasons For Allowance of Writ.

This case presents a conflict between the alleged authority of the Commission over the labeling of perfumes, and the authority of the Federal Security Administrator, who has the authority to enforce the Federal Food, Drug & Cosmetic Act under the Reorganization Act of April 3, 1939, 5 U. S. C. A. Sec. 133.

Regulations under the Federal Food, Drug & Cosmetic Act were promulgated on Dec. 22, 1938. All of these regulations became effective on June 25, 1939. This was almost three years prior to the date on which the Commission made its Findings and Order, namely, April 16, 1942.

Petitioners have fully complied with said regulations, and with the Federal Food, Drug & Cosmetic Act. No proceeding has ever been instituted against petitioners under the Federal Food, Drug & Cosmetic Act.

The matter is of great importance to the food, drug, and cosmetic industries.

They are subjected to dual, independent, and conflicting authorities.

The decision herein is in conflict with,

United Corporation v. *Federal Trade Commission,* 110 Fed. (2d) 473, C. C. A. 4;

Chamber of Commerce v. *Federal Trade Commission,* 13 Fed. (2d) 673, C. C. A. 8;

U. S. v. *Lee,* 40 Fed. Supp. 802, 131 Fed. (2d) 464, C. C. A. 7;

George H. Lee Co. v. *Federal Trade Commission,* 113 Fed. (2d) 583, C. C. A. 8.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of

this Honorable Court directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of said United States Circuit Court of Appeals be reversed; and that your petitioners shall have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ASHER BLUM,
Counsel for Petitioners.

BRIEF FOR PETITIONERS.

After the Federal Food, Drug, and Cosmetic Act went into effect, the Commission had no power to ban labels which are lawful under said Act. It had no jurisdiction to issue its order to cease and desist.

The Federal Food, Drug, and Cosmetic Act is the Act of June 25, 1938, chap. 675; 21 U. S. C. A. 301-392. The pertinent part of 21 U. S. C. A. 362 states:

> "A cosmetic shall be deemed to be misbranded—
>
> (a) If its labeling is false or misleading in any particular.
>
> (b) If in package form unless it bears a label containing,
>
> 1. The name and place of business of the manufacturer, packer, or distributor."

Hence the Administrator had full power to proceed against the labels in issue, if he considered that they violated the Act.

The Federal Food, Drug, and Cosmetic Act gives the usual power,

> "to promulgate regulations for the efficient enforcement of this chapter" (21 U. S. C. A. 371).

Such regulations were promulgated on Dec. 22, 1938. All said regulations have been effective since June 25, 1939. They are found in a publication entitled "Federal Security Agency—Food and Drug Administration—Service and Regulation Announcements", issued August, 1939, revised August, 1941.

The pertinent part of these regulations (Sec. 2.202, p. 34 of said publication) states:

"(a) If a cosmetic is not manufactured by the person whose name appears on the label, the name shall be qualified by a phrase which reveals the connection such person has with such cosmetic such as 'Manufactured for and Packed By—Distributed by' or other similar phrase which expresses the facts.

(b) The statement of the place of business shall include the street address, if any, of such place, unless such street address is shown in a current city directory or telephone directory."

The designation "cosmetic" includes a perfume in the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 321 (1)).

The Administrator has specifically ruled that "cosmetic" includes perfume.

On Feb. 15, 1940 (Trade Correspondence Ruling No. 60), the Administrator was asked,

"Would requirements of statute be met if information required is placed on a tag label to be affixed to the neck of a perfume bottle?"

The pertinent part of the ruling stated:

"if the required information is stated conspicuously on the tag and permanently affixed to a label on the bottom of the bottle, the labeling requirements of the statute will have been met."

The Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 334) further provides that any adulterated or misbranded cosmetic,

"when introduced into or while in interstate commerce",

"shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district

> court of the United States within the jurisdiction of which the article is found."

If such libel had been filed, petitioners would be entitled to demand a trial by jury.

As an alternative, the statute (21 U. S. C. A. 332) provides for injunctive enforcement, in which case petitioners would be entitled to a trial by the Court and not by the Commission.

It is undisputed that no proceeding has ever been filed against petitioners or their merchandise, under the Federal Food, Drug, and Cosmetic Act.

The Order to Cease and Desist (R. pp. 115-116) goes beyond the Federal Food, Drug, and Cosmetic Act. There is nothing in said Act which forbids petitioners from using their corporate names, even though they do not state specifically in their labels, that their products are made in the United States. The Order to Cease and Desist (R. p. 116, par. 2) forbids petitioners from using their corporate names, without such warning phrases.

The Commission's Order is so broad that it would be insufficient for Houbigant, Inc. to state on its labels,

> "Houbigant Inc. 539 W. 45th St. New York, New York."

although this would fully comply with the Federal Food, Drug, and Cosmetic Act. Under the Regulation (*supra*, p. 7), if Houbigant Inc. is the manufacturer, it is not necessary to state that the perfumes are "Manufactured by", or to use any similar statement. It is enough to state the name and address of Houbigant Inc. It is even unnecessary to state the street address.

Under the Order to Cease and Desist, Houbigant must additionally state in perpetuity that its goods are manufactured in the United States, merely because it is the successor

to a foreign business. This is a clear case in which the Commission is attempting to legislate, by requiring more than is required by the Federal Food, Drug and Cosmetic Act.

Since the alcohol which is used to dissolve a perfume concentrate is odorless and evaporates immediately when the perfume is put on the skin or on a handkerchief, such alcohol has no effect on the quality of the perfume. Since petitioners imported the concentrates and merely dissolved them in domestic alcohol, they did not compound or manufacture the perfumes in the United States, under the Federal Food, Drug, and Cosmetic Act or the regulations thereunder. Petitioners have not violated said Act in any manner.

If petitioners did violate said Act, the Commission had no power to enforce it. It cannot demand that petitioners go beyond the requirements of the Federal Food, Drug and Cosmetic Act. Exclusive jurisdiction to restrain the acts in issue herein, has been vested in the Administrator, since the Federal Food, Drug, and Cosmetic Act went into effect. It makes no difference if this proceeding was instituted prior to June 25, 1938. The critical date is the date of the Order to Cease and Desist (R. pp. 115 and 116) namely, April 16, 1942. At this time, the Federal Food, Drug and Cosmetic Act had been in full effect for more than two years.

On April 16, 1942 the labeling control of the Food and Drug Administration was necessarily exclusive. The Federal Food, Drug and Cosmetic Act was enacted subsequently to all amendments to the Federal Trade Commission Act, including the enactment of the Wheeler-Lea Act.

United Corporation v. *Federal Trade Commission*, 110 Fed. (2d) 473, C. C. A. 4th, decided March 11, 1940.

It was held that the Commission had no jurisdiction to prevent the alleged false use of "Virginia" in labeling canned meats. It was pointed out that the Secretary of Agriculture had been given jurisdiction, to prevent any meat packer from engaging in or using any

> "unfair, unjustly discriminatory, or deceptive practice or device in commerce" (p. 474).

The Court stated (p. 475):

> "Only confusion would result from an overlapping jurisdiction * * *."

The Court further stated on pages 475 and 476:

> "And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of the order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future. * * * An analogy is furnished, however, by the rule prevailing in equity to the effect that the court, in making its decree, is governed by the situation existing at the time the decree is entered, and not by that which existed at the inception of the litigation."

> "A case directly in point is Chamber of Commerce v. Federal Trade Commission, 8 Cir. 13 F. 2d 673, 685. It appeared in that case, that, while a proceeding against the Minneapolis Chamber of Commerce was pending before the Trade Commission, Congress passed the Futures Act, 7 U. S. C. A. Sec. I et seq, regulating a number of matters involved in the proceeding. In holding that as to these matters the Com-

mission ceased to have jurisdiction, notwithstanding that the proceeding had been filed before the passage of the Grain Futures Act, the Court said:

> 'The above act was passed after this complaint was filed but before the order was made herein. As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing therefrom'."

In the original drafts of the Federal Food, Drug and Cosmetic Act, jurisdiction over false advertising of foods, drugs and cosmetics, was given to the Secretary of Agriculture. The Congress finally compromised the matter, by giving exclusive jurisdiction over *labeling* to the Food and Drug Administration, and giving exclusive jurisdiction over *false advertising* to the Federal Trade Commission.

In House Report No. 1613, 1st Session, 75th Congress, August 19, 1937, in referring to the amendment which gave the Federal Trade Commission jurisdiction over false advertising, instead of the Food and Drug Administration, it was stated (p. 5):

> "The Federal Trade Commission as an independent quasi-judicial body, has a procedure better calculated to handle multitudinous types of advertising and to do its work to the greater confidence and satisfaction of the public than any purely administrative body".

As further showing that the Wheeler-Lea Act excluded control over the labeling of cosmetics, said Act (15 U. S. C. A. 52), makes it unlawful,

"to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; * * * ".

It is stated in the Wheeler-Lea Act, 15 U. S. C. A. 55:

"For the purposes of sections 52, 53 and 54 of this title—

False advertisement.

(a). The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect;"

In 21 U. S. C. A. 321, it is provided:

"(m). The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article".

In the "Columbia Law Review" (1939), Vol. 39, page 266, in commenting on the Federal Trade Commission Act, as amended by the Wheeler-Lea Act, it is stated:

"The definition of 'false advertising' used in the statute is interesting; it is any advertising other than labeling, which is misleading in a material respect".

It is stated on page 266, in footnote 59:

"Jurisdiction over false statements in the labeling of products is vested in the Secretary of Agriculture. Public No. 717, 75th Cong. June 25, 1938, Sec. infra, p. 272".

On page 272, it is stated:

"Moreover, it seems unwise to split the jurisdiction over falsity of representation in the field of

> foods, drugs, devices, and cosmetics, between the Federal Trade Commission and the Secretary of Agriculture. Much duplication must result. If the A Company falsely represents, both on a label and in an advertisement, that its product is a cure for some disease, two proceedings will be necessary to halt it. A more efficient system would join these two jurisdictions in the same body."

On page 272, reference is made, on this point, to an editorial in the "Journal of the American Medical Association", Vol. 110 (1938), pages 1112, 1113.

The history of the Federal Food, Drug, and Cosmetic Act and of the Wheeler-Lea Act, is stated in,

> *United States* v. *Lee*, 40 Fed. Supp. 801, District Court, E. D. Wisconsin, per Judge DUFFY, reversed 131 F. (2d) 464, C. C. A. 7th.

This was an action for an injunction to restrain misbranding, under the Federal Food, Drug and Cosmetic Act.

Lee had distributed certain circulars to its agents, separately from its products. These agents displayed such circulars to retail customers, when defendant's products were sold at retail. Judge DUFFY dismissed the complaint, because he held that such circulars were *false advertising*, over which the Federal Trade Commission had exclusive jurisdiction, as distinguished from *misbranding*, over which the Federal Security Administrator had sole jurisdiction.

40 Fed. Supp. page 802:

> "In determining the intent of Congress, it may be helpful to recall the legislative history of the act in question, which at that time was commonly called the 'Copeland Bill'. The bill, as introduced, gave jurisdiction to enforce same to the Department of Agriculture. It was generally known at that time

that the Federal Trade Commission desired to enforce any provisions as to false advertising. While the Copeland Bill was pending, Public Act No. 447, 52 Stat. 111, 15 U. S. C. A. Secs. 41 et seq., was passed (approved March 21, 1938), which measure specifically gave jurisdiction over false advertising of foods, drugs, and cosmetics to the Federal Trade Commission. Thereafter the Copeland Bill was amended and, as passed (approved June 25, 1938), gave jurisdiction to the Department of Agriculture to enforce the provisions as to the adulteration, packaging, and labeling; but the enforcement as to false advertising remained in the Federal Trade Commission. On June 30, 1940, the enforcement of the Federal Food, Drug, and Cosmetic Act was transferred from the Department of Agriculture to the Federal Security Agency."

The Circuit Court of Appeals reversed, solely because it held that the circulars constituted *labeling*, as distinguished from advertising. It did not disagree with Judge DUFFY, on the question of jurisdiction between the Federal Security Agency and the Federal Trade Commission.

It was clearly the intent of Congress, in enacting the Federal Food, Drug and Cosmetic Act, to give new and exclusive jurisdiction over the labeling of cosmetics to the Food and Drug Administration.

House of Representatives Report No. 2139, 75th Congress, 3rd Session—April 14, 1938.

Page 2:

"The principal respects in which the measure differs from the present law are . . .

"The adulteration and misbranding of cosmetics is prohibited."

Page 9:

"Sections 601 and 602 define adulterated and misbranded cosmetics, respectively. They are entirely

new in Federal food and drug legislation. They are designed to safeguard the consumer against injury in the use of cosmetics and to require truthful labeling."

Statement of the Managers on the Part of the House. House of Representatives Report No. 2716, 75th Congress, June 11, 1938:

> "It is to be noted that the function of the Secretary in making regulations and orders to carry them out is legislative in character".

House of Representatives Report No. 429, 76th Congress, 1st Session, April 18, 1939.

Page 2:

> "The new law contains many provisions which were not contained in the old Food and Drugs Act of 1906. These provisions, in greater part, are designed to require informative labeling, in order that the purchasers may more intelligently select foods, drugs, and cosmetics for their needs, and in order to prevent the development of unfair competitive situations arising from labels which tell little or nothing. These provisions of the new law are sweeping in scope. They necessitate the revision of nearly all existing labels for these commodities."

Conclusion.

The petition should be granted.

Dated September 5th, 1944.

Respectfully submitted,

ASHER BLUM,
Counsel for Petitioners.

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No. 438

In the Supreme Court of the United States

October Term, 1944

HOUDAILLE-DUVAL, OHLEMACHER INC., AND HOUDAILLE SALES CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Statutes:

Federal Food, Drug and Cosmetic Act of June 25, 1938, 52 Stat. 1040, 21 U. S. C. 301 *et seq* — 4, 5, 6

Federal Trade Commission Act, 38 Stat. 717, as amended:

Section 5, 15 U. S. C. 45 — 2, 5, 9, 10

Section 12, 15 U. S. C. 52 — 7

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Food and Drug Act of June 30, 1906, 34 Stat. 768:

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 438

HOUBIGANT INC., CHERAMY INC., AND HOUBIGANT SALES CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 132) is reported in 139 F. (2d) 1019.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 9, 1944 (R. 145). The petition for a writ of certiorari was filed on September 6, 1944. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act as amended (52 Stat. 111, 15 U. S. C. 45) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether enactment of the Federal Food, Drug and Cosmetic Act removed jurisdiction to proceed under Section 5 of the Federal Trade Commission Act against unfair methods of competition involving the misleading labeling of cosmetics.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, prior to its amendment by the Act of March 21, 1938, 52 Stat. 111, provided in part as follows:

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * *, from using unfair methods of competition in commerce.[1]

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[1] The Commission instituted this proceeding before, but concluded it after, Section 5 was amended by the Wheeler-Lea Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45. The Section as amended provides in part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * *, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

This proceeding would be governed by the broader amendment of 1938 (*Ziffrin, Inc.*, v. *United States*, 318 U. S. 73; *Vandenbark* v. *Owen-Illinois Glass Co.*, 311 U. S. 538), but Section 5 of the earlier law, if Section 5 applies, was obviously sufficiently comprehensive to cover petitioner, and petitioner makes no claim to the contrary.

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission issued an order directing petitioners to desist (1) from using the terms "Paris" or "Paris, France", or other terms indicative of foreign origin, and (2) from using the words "Houbigant", "Cheramy", or any other foreign words or terms as brand or trade names for toilet preparations made or compounded in the United States, without stating in immediate conjunction therewith that such products are made or compounded in the United States (R. 115–116). The court below stated that petitioners objected only to clause (2) of the Commission's order (R. 132), and we interpret the petition for writ of certiorari as being also limited to clause (2).

The Commission's findings, which petitioners do not question, show the following:

Petitioners Houbigant, Inc., and Houbigant Sales Corporation use in the sale of certain toilet preparations labels, containers, and bottles carrying the words "Houbigant" or "Houbigant-Paris-New York." For many years, perfumes, colognes, and toilet preparations of high quality have been manufactured by La Perfumerie Houbigant of Paris, France, and distributed in this country under the name "Houbigant" and a substantial part of the purchasing public associates this word with the products of the Paris concern. Its products have general consumer acceptance and, in

addition, perfumes and toilet preparations manufactured in France command higher prices in this country than those of United States manufacture because of the buying public's preference for the former. (R. 110–112.)

Houbigant, Inc., has been authorized by La Parfumerie Houbigant to make and distribute in the United States products compounded according to the formulae of the Paris concern (R. 111). Houbigant, Inc., in making perfumes, colognes, and toilet preparations, mixes perfume products imported in the form of concentrates with domestic alcohol and with certain imported fixatives or essential oils or synthetic materials (R. 113).

The practices and course of business of petitioner Cheramy, Inc., are similar to those of the Houbigant petitioners, the French concern in its case being Parfums Cheramy S. A. (R. 111, 113).

Petitioners' representations have misled a substantial part of the purchasing public as to the origin and place of manufacture of petitioners' products and have diverted trade unfairly from competitors who actually import perfumes and similar products from foreign countries or who sell products of domestic manufacture and truthfully represent their origin (R. 113–114).

The court below, on the authority of prior decisions of that court, held in a *per curiam* opinion that the Federal Food, Drug and Cosmetic Act of June 25, 1938, 52 Stat. 1040, 21 U. S. C. 301,

et seq., had not vested in the Federal Security Administration, which administers that Act, exclusive jurisdiction over the labeling of perfumes (R. 132–133).

ARGUMENT

Petitioners contend that the Federal Food, Drug and Cosmetic Act of June 25, 1938, is exclusive as to matters within its purview and that Section 5 of the Federal Trade Commission Act therefore does not apply to any unfair method of competition which constitutes a violation of the later statute. Both court decisions and administrative construction of the Trade Commission Act are squarely contrary to this contention.

Under Section 2 of the Food and Drug Act of June 30, 1906 (34 Stat. 768, 21 U. S. C. 2), it has long been a federal offense to sell any misbranded food or drug in interstate commerce. For many years the Federal Trade Commission has exercised concurrent jurisdiction with those charged with enforcing the Food and Drug Act, and the authority of the Commission to deal with misleading labeling of food under circumstances in which the false labeling is a misbranding prohibited by the Food and Drug Act has been uniformly sustained by the courts.[2] The authority of the Commission

[2] *Royal Baking Powder Co.* v. *Federal Trade Commission*, 281 Fed. 744 (C. C. A. 2); *Federal Trade Commission* v. *Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6); *Federal Trade Commission* v. *Morrissey*, 47 F. (2d) 101 (C. C. A. 7).

Section 10 of the Food and Drug Act, 21 U. S. C. 10, provided that a food was misbranded if it was an imitation of or

to prohibit as an unfair method of competition conduct which is "misbranding" contrary to the Food and Drug Act was specifically passed upon and upheld in *Justin Haynes & Co.* v. *Federal Trade Commission,* 105 F. (2d) 988, 989 (C. C. A. 2), and this point was one of the "questions presented" in the petition for certiorari, but certiorari was denied, 308 U. S. 616.

The Food and Drug Act was repealed by the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040. (See note to 21 U. S. C. A. 392.) The later Act is, in substance, amendatory in nature. It continued the prohibitions of the prior statute, the principal changes being a refinement and expansion of the definitions of misbranding and adulteration, authorization of equity proceedings to enjoin violations, and bringing cosmetics under the statute. There clearly is no reason for regarding this legislation as being any more exclusive than the Food and Drug Act which it superseded.

Petitioners (Pet. 12) rely upon an amendment to the Federal Trade Commission Act made by the Wheeler-Lea Act of March 21, 1938, 52 Stat. 114, as showing that Congress intended to deprive the Federal Trade Commission of jurisdiction to deal with the labeling of foods, drugs, and cosmetics.

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offered for sale under the distinctive name of another article, or if it was labeled or branded so as to mislead the purchaser, or if its package or label bore any statement regarding ingredients which was false or misleading.

The Wheeler-Lea Act amended Section 5 of the Federal Trade Commission Act in respects not now material, and added to the original statute Sections 12, 13, 14, and 15 (15 U. S. C. 52–55). Section 12 makes it unlawful to disseminate in interstate commerce any false advertisement which is likely to induce the purchase of foods, drugs, or cosmetics. Section 13 authorizes the Commission to bring proceedings in the federal district courts to enjoin violations of Section 12, and Section 14 imposes criminal penalties for violation of Section 12. Section 15 provides in part:

> For the purposes of sections 12, 13, and 14—(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading * * *.

The express exclusion of labeling from the new authority granted to the Commission, without any such exclusion respecting its authority to proceed administratively under Section 5 against unfair methods of competition or unfair or deceptive acts or practices, plainly leaves the authority conferred by that Section untouched. In *Fresh Grown Preserve Corp.* v. *Federal Trade Commission,* 125 F. (2d) 917, 919 (C. C. A. 2), the court, in rejecting the contention that the definition of "false advertisement" in the new Section 15 operated to limit the scope of Section 5 so as to exclude therefrom any false labeling of foods, drugs, or cosmetics, said:

> The additions found in §§ 12 to 15, inclusive, were also to give the Commission greater control over the advertising of food, drugs, cosmetics and the like by providing for criminal action as well as injunction; and only in proceedings under such sections is the definition of false advertisement in § 15 relevant, not in a proceeding like this under § 5.

Petitioners assert (Pet. 4) that the decision below is in conflict with three decisions of circuit courts of appeals of other circuits. We submit that there is no conflict of decisions.

In *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673 (C. C. A. 8), the Commission's order prohibited a nonprofit membership corporation conducting a grain exchange from engaging in certain acts and practices injurious to another membership grain exchange. The Chamber of Commerce contended that the Commission was without jurisdiction because Congress had exercised its regulatory power over grain exchanges by the Grain Futures Act and this legislation was exclusive of all other regulatory statutes applicable to these exchanges. The court, however, held (pp. 685–686) that the Commission had jurisdiction and that its order was valid except to the extent that it was in "conflict" with the provisions of the later statute. In the instant case, there is no conflict between the order of the Commission and the provisions of the Federal Food, Drug and Cosmetic Act.

In *United Corporation* v. *Federal Trade Commission,* 110 F. (2d) 473 (C. A. A. 4), the court held that the Commission had no jurisdiction to deal with acts or practices which are subject to regulation under the Packers and Stockyards Act. The ground of decision was that both Section 5 of the Federal Trade Commission Act, as amended, and Section 406 of the Packers and Stockyards Act, 7 U. S. C. 227, expressly excluded from the jurisdiction of the Commission persons and matters subject to regulation under the Packers and Stockyards Act.

George H. Lee Co. v. *Federal Trade Commission,* 113 F. (2d) 583 (C. C. A. 8), simply held that where the falsity of certain representations had been put in issue and decided in a judicial proceeding brought by the United States to enforce the Food and Drug Act, the falsity of the same representations was *res adjudicata* in a proceeding brought by the Federal Trade Commission against a party defendant in the prior litigation.

Petitioners also state (Pet. 4) that the decision below is in conflict with *United States* v. *Lee,* 40 F. Supp. 801 (E. D. Wis.). The holding there was that the definition of labeling in the Federal Food, Drug and Cosmetic Act should be construed in connection with the jurisdiction over false advertisement of these commodities given the Federal Trade Commission by the Wheeler-Lea Act. But, as we have previously stated, the new Sections added by that Act do not determine the Com-

mission's jurisdiction under Section 5 of the Federal Trade Commission Act. Furthermore, the district court's decision was reversed in *United States* v. *Lee,* 131 F. (2d) 464 (C. C. A. 7), where the court held that the same conduct may fall within the ban of both the Federal Food, Drug and Cosmetic Act and the Sections of the Federal Trade Commission Act added by the Wheeler-Lea Act.

CONCLUSION

The decision below is clearly correct, and there is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

CHARLES H. WESTON,
MATTHIAS N. ORFIELD,
Special Assistants to the Attorney General.

WALTER J. CUMMINGS, Jr.,
Attorney.

W. T. KELLEY,
Chief Counsel,
JOSEPH J. SMITH, Jr.,
Asistant Chief Counsel,
Federal Trade Commission.

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